U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: MAR 1 8 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an engineering and planning firm. It seeks to employ the beneficiary permanently in the United States as a structural engineer under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by a Form ETA 9089, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the marriage fraud bar under section 204(c) of the Act applies to the case and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's May 23, 2012 denial, an issue in this case is whether or not the marriage bar under section 204(c) of the Act applies to this case. The petition was denied as a result of the beneficiary's other immigrant visa petition. A Form I-130, Petition for Alien Relative (Form I-130), was filed on the beneficiary's behalf on August 6, 2001. Concurrent with the filing of Form I-130, the beneficiary also sought lawful permanent residence and employment authorization as the immediate relative of a U.S. citizen. The file contains the completed forms, signed by the beneficiary, a copy of a marriage certificate between the beneficiary and and a copy of the divorce certificate between and her former spouse. The Form I-130 was withdrawn by in a letter dated July 7, 2003 in which she claimed that the beneficiary married her for the sole purpose of obtaining his lawful permanent residency and that the couple had not lived together from June 2001 to April 2002.

In connection with the Form I-130, a decision was issued by the Chicago field office director of the U.S. Citizenship and Immigration Services (USCIS) office located in Chicago, IL on October 27, 2003. The decision denied the Form I-130 because the petitioning spouse had withdrawn the Form I-130.

A second Form I-130 was filed on the beneficiary's behalf on July 28, 2007 by the same petitioning spouse. Concurrent with the filing of Form I-130, the beneficiary also sought lawful permanent residence and employment authorization as the immediate relative of a U.S. citizen. The file contains the completed forms, signed by the beneficiary, a copy of a marriage certificate between the beneficiary and the petitioning spouse, and a copy of the divorce certificate between and her former spouse as well as the divorce certificate between the beneficiary and his former spouse. Additional documents were submitted in response to a request for additional evidence. The Form I-130 was withdrawn by in a letter dated July 29, 2008 in which she claimed that the beneficiary married her to legally remain in the United States and that the couple was not living together.

In connection with the Form I-130, a decision was issued by the Chicago field office director of the U.S. Citizenship and Immigration Services (USCIS) office located in Chicago, IL. On December 10,

2008. The decision denied the Form I-130 because the petitioning spouse had withdrawn the Form I-130.[1]

Section 204(c) provides for the following:

> Notwithstanding the provisions of subsection (b)[2] no petition shall be approved if:
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> (1) the alien has previously been accorded, or has sought to be accorded, an immediate relative or preference status as the spouse of a citizen of the United States or the spouse of an alien lawfully admitted for permanent residence, by reason of a marriage determined by the [director] to have been entered into for the purpose of evading the immigration laws; or
> (2) the [director] has determined that the alien has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws.

The record of proceeding contains the following relevant evidence: an incomplete and undated copy of a decision voiding the marriage from the Philippines regarding the beneficiary and [redacted] submitted on appeal; a withdrawal letter written by the petitioning spouse, [redacted] dated July 7, 2003; a withdrawal letter written by the petitioning spouse, [redacted], dated July 29, 2008; a letter written by the petitioning spouse, [redacted] dated July 24, 2007, explaining that she would like to petition for her husband, the beneficiary, a second time; an undated and unsworn statement signed by the beneficiary regarding his marriage to [redacted] an undated and unsworn statement signed by the petitioning spouse, [redacted] regarding her marriage to the beneficiary; an affidavit dated March 4, 2008 by [redacted], a friend of [redacted] an unsworn statement dated February 26, 2008 by [redacted] aunt of the beneficiary; a response to the Service's request for additional evidence (RFE) dated February 6, 2008 which contains copies of phone records; copies of photos of the couple; copies of insurance information; emails between the couple; a copy of a joint credit card; copies of gym membership information; a copy of the beneficiary's Illinois driver's license, vehicle registration, and title; a copy of the beneficiary's credit card statement from February 2004; copies of airline reservations; copies of joint checking account statements; letters from the beneficiary's current and former employer regarding his work situation; copies of the beneficiary's Forms W-2 for 2003 and 2007; and copies of mail received in Glen Ellyn, IL.

On appeal, counsel asserts that the director applied the wrong evidentiary standard in determining that the marriage was not *bona fide*; that the director violated the beneficiary's due process rights by issuing a Notice of Intent to Deny (NOID) for the first time on March 19, 2012, years after the initial

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[1] The AAO notes that the beneficiary listed the petitioning spouse as a former spouse on his Form G-325A, Biographic Information, dated December 7, 2011, and states the marriage terminated in Wheaton, IL on October 1, 2008, two months before the director issued its decision on December 10, 2008.

[2] Subsection (b) of section 204 of the Act refers to preference visa petitions that are verified as true and forwarded to the State Department for issuance of a visa.

I-130s were filed; that the petitioner and the beneficiary were prejudiced by not being afforded the opportunity to respond to the marriage fraud allegations; and that the evidence contained in the record proves by a preponderance of the evidence that the marriage was entered into in good faith.

The record of proceeding contains evidence that two family-based immigrant petitions were filed to obtain an immigration benefit for the beneficiary in order to evade the immigration laws.

In his brief on appeal, counsel asserts that the director applied the wrong evidentiary standard in determining that the marriage was not *bona fide*.[3]

The standard for reviewing section 204(c) appeals is laid out in *Matter of Tawfik*, 20 I&N Dec. 166 (BIA 1990). In *Tawfik*, the Board held that visa revocation pursuant to section 204(c) may only be sustained if there is substantial and probative evidence in the record of proceeding to support a reasonable inference that the prior marriage was entered into for the purpose of evading immigration laws. *See also Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972).

Tawfik at 167 states the following, in pertinent part:

> Section 204(c) of the Act . . . prohibits the approval of a visa petition filed on behalf of an alien who has attempted or conspired to enter into a marriage for the purpose of evading the immigration laws. Accordingly, the district director must deny any subsequent visa petition for immigrant classification filed on behalf of such alien, regardless of whether the alien received a benefit through the attempt or conspiracy. As a basis for the denial it is not necessary that the alien have been convicted of, or even prosecuted for, the attempt or conspiracy. However, the evidence of such attempt or conspiracy must be documented in the alien's file and must be substantial and probative.

(citing *Matter of Kahy*, 19 I&N Dec. 803 (BIA 1988); *Matter of Agdinaoay*, 16 I&N Dec. 545 (BIA 1978); *Matter of La Grotta*, 14 I&N Dec. 110 (BIA 1972); and 8 C.F.R. § 204.1(a)(2)(iv) (1989)). Tawfik states that the revocation decision may be made at any time and is properly determined by the district director in the course of his adjudication of the subsequent visa petition. *Id.* at 168 (citing *Matter of Samsen*, 15 I&N Dec. 28 (BIA 1974)).

In this case, the record contains substantial and probative evidence to support a finding that the marriage was entered into for the purpose of evading immigration laws. The petitioning spouse filed an I-130 on behalf of the beneficiary on two separate occasions, and on both occasions, the petitioner withdrew the petition. In the petitioning spouse's first withdrawal letter dated July 7, 2003, she stated that the beneficiary used her to stay in the United States legally and that they did not live

[3] In its decision, the director relied on 8 C.F.R. Section 245.1 (c)(8)(v) and stated that the beneficiary must show by clear and convincing evidence that he married the petitioning spouse in good faith. This section was applied in error, and this part of the director's decision will be withdrawn.

together from June 2001 to April 2002. In a letter dated July 24, 2007, the petitioning spouse explains that she is petitioning for the beneficiary again and that the previous letter requesting withdrawal of the first petition was a result of "some misunderstanding during our adjustment period." However, the petitioning spouse then filed a withdrawal letter dated July 29, 2008 for the second petition in which she states that the beneficiary married her so that he could stay in the United States legally and that they did not live together. The petitioning spouse's statements regarding the validity of the marriage on two separate occasions are substantial and probative evidence that the marriage is not *bona fide*.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988), states:

> [i]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence. Attempts to explain or reconcile the conflicting accounts, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Furthermore, doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.*

In this case, the record contains many inconsistencies that are not resolved through independent, corroborating evidence, and which cast doubt on the validity of the evidence, and therefore, on the validity of the beneficiary's marriage to the petitioning spouse.

The record contains contradictory statements from the beneficiary, the petitioning spouse, the petitioning spouse's friend, and the beneficiary's aunt regarding the dates that the beneficiary and the petitioning spouse lived together. In the letter withdrawing the I-130 petition dated July 7, 2003, the petitioning spouse states that the beneficiary did not live with her from the date of their marriage on June 15, 2001 to April 2002. In an undated letter submitted with the response to the RFE dated March 5, 2008, the beneficiary states that they lived apart for "almost ten months after being married." However, in the beneficiary's sworn affidavit dated April 19, 2012, he states that the couple lived together from August 2001 to December 2003. This completely contradicts his prior statement in an undated statement submitted on appeal, which states that the couple lived apart for ten months after they were married. The statements from [redacted] friend of the petitioning spouse, and [redacted] the beneficiary's aunt, which are dated March 4, 2008 and February 26, 2008, respectively, state only that the beneficiary lived with the petitioning spouse from May 2002 to November 2003, but do not refer to any other time period during the course of the almost-seven years the couple had been married at the time the statements were written. Furthermore, on the Form G-325A dated June 26, 2001, the beneficiary stated that he began living with the petitioning spouse in June 2001, however, on the Form G-325A dated July 21, 2007, the beneficiary indicated that he began living with the petitioning spouse in April 2002. No independent and objective evidence has been submitted to reconcile the inconsistencies regarding the dates the beneficiary and the petitioning spouse lived together.

Furthermore, there are inconsistencies regarding the beneficiary's prior marriage. The beneficiary was married to another woman at the time he married the petitioning spouse. The beneficiary's prior marriage was terminated through divorce on May 22, 2003, however, the beneficiary married the petitioning spouse on June 15, 2001. In a sworn statement dated April 19, 2012, the beneficiary claims that he thought his prior marriage had been annulled in the Philippines in 1995 because that is what his ex-wife told him. He further states that he had filed for an annulment in the Philippines in 1990, but he hired an attorney and never had to appear in court. He claims that the court requested additional documents in 1994 which he could not provide because he was working in Taiwan. As a result, according to the beneficiary, the annulment was never finalized.

The record on appeal contains a decision from the Philippines which counsel, in his brief, claims is a decision from the [redacted] Philippines in response to the beneficiary's complaint filed to annul his marriage to his former wife. The document is undated and incomplete, and the outcome of the proceedings is not included in the partial document submitted. The document also contradicts the beneficiary's sworn statement in the affidavit dated April 19, 2012 that the annulment he filed for in 1990 was never concluded and that he was never called on to testify. The document refers to a trial, the beneficiary taking the witness stand, cross-examination and re-direct of the beneficiary, and the beneficiary's testimony at trial.

Thus, the beneficiary has failed to resolve the many inconsistencies in the record through independent, objective evidence which cast doubt on the validity of the evidence presented, and therefore on the validity of the beneficiary's marriage to the petitioning spouse.

Where there is reason to doubt the validity of the marital relationship, the petitioner must present evidence to show that the marriage was not entered into for the purpose of evading the immigration laws. Such evidence could take many forms, including, but not limited to, proof that the beneficiary has been listed as the petitioner's spouse on insurance policies, property leases, income tax forms, or bank accounts, and testimony or other evidence regarding courtship, wedding ceremony, shared residence, and experiences. *See Matter of Soriano,* I&N Dec. 764 (BIA 1988).

In the instant case, the evidence contained in the record does not show that the marriage was not entered into for the purpose of evading the immigration laws. The record contains copies of airline reservations submitted to show that the couple visited each other regularly. However, the evidence submitted consists only of five airline reservations dated May 8, 2006, August 24, 2006, July 26, 2007, September 12, 2007, and February 10, 2008 and a statement by the attorney that the majority of times that the couple saw each other, the beneficiary drove from Connecticut to Illinois. However, there is only one credit card statement from January 2008 evidencing a trip from Connecticut to Illinois via car. There is nothing in the record besides counsel's assertions to show that the beneficiary and petitioner visited each other "regularly." The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Visiting each other six times over the course of a seven-year marriage does not constitute regular visits.

The record also contains cell phone records addressed to the beneficiary. Counsel states in the response to the RFE that the couple keeps in touch by talking on the phone "at least once a day." However, there are three phone numbers linked to the account in some months, and four phone numbers linked to the account in other months. The bill is in the beneficiary's name only, and there is no indication that any of those phone numbers belong to the petitioning spouse. In fact, the petitioning spouse listed a different phone number on the I-130 and on the I-864 Affidavit of Support filed on July 28, 2007 than any of the phone numbers listed on the phone bill.

Furthermore, the evidence submitted regarding the beneficiary and the petitioning spouse's co-mingling of finances appears to be general in nature. For example, the record contains bank statements for a joint checking account for the period August 10, 2007 to February 29, 2008. None of these bank statements contain joint usage or use for any joint bills, nor is either the beneficiary or the petitioning spouse depositing their paychecks into this account. Moreover, the statements show very low balances and minimal activity for the entire period. For the period October 11, 2007 to January 10, 2008, no deposits were made to the account, and only $2.98 was withdrawn from it. Additionally, no evidence of co-mingling of finances was submitted for the period prior to August 2007.

Therefore, the evidence in the record shows that the marriage was entered into for the purpose of evading the immigration laws.

In his brief on appeal, counsel also argues that the petitioning spouse and beneficiary were prejudiced because the Service did not accuse them of marriage fraud until years after the initial I-130 petitions had been withdrawn by the petitioner. However, as the director may revoke an I-130 petition at any time during the course of his adjudication of a subsequent visa petition, so too may the director enter a finding of marriage fraud at any time in the adjudication of a subsequent petition. *See Matter of Tawfik, supra* at 168.

In his brief on appeal, counsel further argues that the petitioning spouse and the beneficiary were prejudiced because the NOID was mailed to the I-140 petitioner and not to the petitioning spouse. Counsel further argues that the beneficiary and the petitioning spouse were denied due process by not receiving a fair hearing to respond to the allegations. Alien beneficiaries do not normally have standing in administrative proceedings. *See Matter of Sano*, 19 I&N Dec. 299, 300 (BIA 1985). Alien beneficiaries ordinarily do not have a right to participate in proceedings involving the adjudication of a visa petition, as the petition vests no rights. *See Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988). Moreover, there are no due process rights implicated in the adjudication of a benefits application. *See Balam-Chuc v. Mukasey*, 547 F.3d 1044, 1050-51 (9th Cir. 2008); *see also Lyng v. Payne*, 476 U.S. 926, 942 (1986) ("We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause of the Fifth or Fourteenth Amendment."). However, since a fraud finding affects an alien's admissibility, the AAO permitted the limited participation of the beneficiary to respond to the derogatory information that directly impacts his ability to procure benefits in any future proceedings. *Cf. Matter of Obaigbena*, 19 I&N Dec. 533, 536 (BIA 1988). Therefore, the beneficiary's evidence and counsel's arguments regarding the beneficiary's evidence are considered

on appeal. Furthermore, the beneficiary was obviously aware of, and has had the opportunity to respond to, the derogatory information as he responded to the NOID and has submitted evidence on appeal.

Therefore, an independent review of the documentation reflects substantial and probative evidence that the beneficiary attempted to evade the immigration laws by marrying and that attempt is documented in the alien's file. Thus, the director's determination that the beneficiary sought to be accorded an immediate relative or preference status as the spouse of a citizen of the United States by reason of a marriage determined by USCIS to have been entered into for the purpose of evading the immigration laws is affirmed.

Beyond the decision of the director,[4] the petitioner has also not established that the beneficiary is qualified for the offered position. The petitioner must establish that the beneficiary possessed all of the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* v. *Smith,* 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

In the instant case, the labor certification states that the offered position requires a bachelor's degree in civil engineering or foreign equivalent, and 60 months experience in the job offered of structural engineer. No training is required. Additionally, no alternate field of study, alternate combination of education and experience, or experience in an alternate occupation is acceptable. The labor certification further states that the beneficiary must be licensed as a professional engineer in Connecticut.

On the labor certification, the beneficiary claims to qualify for the offered position based on experience with as a project structural engineer from May 28, 2002 to March 15, 2004; as a structural engineer from April 21, 2000 to February 9, 2001; as a senior engineer from September 12, 1995 to December 31, 1999; as a senior civil engineer/structural engineer from January 5, 1991 to December 31, 1993; and as a senior structural engineer from March 19, 1988 to June 14, 1990.

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[4] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

The beneficiary's claimed qualifying experience must be supported by letters from employers giving the name, address, and title of the employer, and a description of the beneficiary's experience. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A). The record contains an experience letter from on letterhead, dated February 22, 2008, which states that the beneficiary worked for the company from May 28, 2002 to March 15, 2004. The letter does not state whether the job was full-time, or describe the beneficiary's duties. Additionally, the previous Form 9089, which was signed by the beneficiary under penalty of perjury on May 8, 2006, omits the experience with completely. In response to the director's NOID requesting an explanation for the omission, the beneficiary submitted a sworn affidavit, dated April 19, 2012, in which he states that the information submitted with the current I-140 application is correct and the omission was merely an oversight. He also submitted experience letters to corroborate his experience. However, the beneficiary signed a Form G-325A on July 21, 2007, in which he lists his dates of employment with as May 2002 through November 2003, while the Form 9089 and the experience letter state the end date of employment as March 15, 2004. The record contains no objective, independent evidence to explain this discrepancy.

The record of proceeding also contains an experience letter from dated February 9, 2001. The experience letter states that the beneficiary worked as an associate for the company and was currently assigned to a project as a structural engineer. The letter does not indicate whether the position was full-time and does not discuss the beneficiary's duties. Moreover, the letter, dated February 9, 2001, indicates that the beneficiary was still working for the company. On the Form 9089, signed under penalty of perjury by the beneficiary on May 8, 2006, the beneficiary states that he worked at from April 21, 2000 to April 30, 2001, while on the Form 9089, signed under penalty of perjury on April 20, 2010, the beneficiary states he worked for from April 21, 2000 to February 9, 2001. Additionally, the Form G-325A signed by the beneficiary on December 7, 2011, lists his dates of employment as April 2000 to May 2001, while on the Form G-325A signed on June 26, 2001, the beneficiary lists his employment as April 2000 to "present" which would be at least until June 26, 2001, the date the beneficiary signed the form.

The dates of the beneficiary's employment with the petitioner also contain discrepancies. On the Forms 9089 signed under penalty of perjury on May 8, 2006 and April 20, 2011, the beneficiary's start date with the petitioner is listed as July 6, 2004. However, on the Form G-325A, signed on December 7, 2011, the beneficiary's start date is listed as December 2004. Moreover, in the undated employment letter from president of the petitioner, states that the beneficiary has worked with the petitioner since July 7, 2004.

Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* at 592.

The evidence in the record does not establish that the beneficiary possessed the required experience set forth on the labor certification by the priority date. Therefore, the petitioner has also failed to establish that the beneficiary is qualified for the offered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.